

Case Comments

Is the Right of Access to Trials an Instance of a First Amendment Right to Know?

Richmond Newspapers v. Virginia

INTRODUCTION

The question of whether government should be open to public scrutiny is important in a society that calls itself democratic and free. The extent to which information about how government functions is available to the electorate may determine both the meaningfulness of citizen participation in the democratic process and the accountability of government officials to the public will. On the other hand, government effectiveness may often depend upon confidentiality and secrecy. Although much government information is open to the public under the Freedom of Information Act¹ and although most states have statutes allowing access to public records and legislative body meetings,² the post-Vietnam War trend in which this “sunshine” legislation was enacted could change. The question arises, therefore, whether the first and fourteenth amendments to the Constitution guarantee that government information³ will be available to the public.⁴

Two related lines of cases have brought before the Supreme Court questions bearing on a constitutional open government guarantee. The preferential treatment cases⁵ presented the question of whether the press as proxy for the public is entitled to special first amendment privileges exempting it from certain common duties, the theory being that the press needs the privilege to fulfill its office of providing information about government and government

1. 5 U.S.C. § 552 (1977).

2. See Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1163 n.1169, 1188 n.1307 (1975).

3. This Comment discusses the question of whether the first amendment secures a public right to know information controlled by the government that concerns government operations or actions. The somewhat related question of whether there is a public right to require disclosure of information from private individuals is not discussed. For a brief discussion of the latter question, see Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1513–15 (1974).

4. The question of who would have standing to sue on behalf of the public to vindicate the public right is also not discussed. The question of standing to sue does not usually arise in the first amendment context, because first amendment rights are believed to inhere in individuals. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 8–14 (1970). But the right to know may be based upon rights which inhere in the body politic. See text accompanying notes 17–20 *infra*. If the right to know is a public rather than an individual right, the standing issue may arise. See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974) (standing denied to a taxpayer who could demonstrate only injury common to the public at large). See generally *Warth v. Seldin*, 422 U.S. 490 (1975).

5. *Herbert v. Lando*, 441 U.S. 153 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972). See text accompanying notes 40–52 *infra*.

officials to the public. The right of access cases⁶ presented the question of whether the first amendment secures access to sources of government information to the press, again as the public's agent, or to the public in general. A common question underlies these lines of cases: apart from, or derivative of, its literal protection of speech and press freedom, does the first amendment independently guarantee to the public a right to know government controlled information about the operations of government?⁷

In *Richmond Newspapers v. Virginia*,⁸ a fragmented Supreme Court held that the first and fourteenth amendments to the federal constitution guarantee a public right to witness criminal trials.⁹ This Comment examines the question of whether the rationales adduced to support the ruling in *Richmond Newspapers* are or should be applicable to sources of government information other than criminal trials. In other words, is *Richmond Newspapers* limited to its particular facts or can the case be read to support a generalized right to obtain government information from government sources? In Part I the current debate among commentators on whether the right to know can be legitimately derived from the Constitution will be discussed. The Supreme Court's treatment of the right to know prior to *Richmond Newspapers* will be examined in Part II. In Part III the several opinions of the Justices in *Richmond Newspapers* will be analyzed to determine the scope and doctrinal foundations of the holding in the case. While the conclusion that *Richmond Newspapers* is weak precedent for a generalized right to know is irresistible, four Justices strongly support such a right.¹⁰ No doubt the tension in the case between the scope of protection afforded the right to witness trials and the constitutional underpinnings of that right will require the Court in the future to decide whether the open trial guarantee is an instance of a generalized first amendment right to know.

I. CONSTITUTIONAL DERIVATION OF THE RIGHT TO KNOW

The first amendment states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press,"¹¹ Clearly, the

6. *Gannett v. Depasquala*, 443 U.S. 368 (1979); *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. The Washington Post*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). See text accompanying notes 53-77 *infra*.

7. The right to know question has generated a wealth of scholarly commentary. E.g., BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980) [hereinafter cited as BeVier]; Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976); Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977); O'Brien, *The First Amendment and the Public's Right to Know*, 7 HASTINGS CONST. L.Q. 579 (1980); Note, *The Public's Right of Access to Government Information Under the First Amendment*, 51 CHI-KENT L. REV. 177 (1974); Note, *The Rights of the Public and Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. The Washington Post*, 2 HASTINGS CONST. L.Q. 829 (1975); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980); Comment, *The Right of the Press to Gather Information after Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975).

8. 448 U.S. 555 (1980).

9. Seven Justices concurred in the judgment. No opinion commanded the support of more than three Justices. See text accompanying notes 85-90 *infra*.

10. Justices Brennan, Marshall, Powell, and Stevens. See note 92 *infra*.

11. U.S. CONST. amend. I.

first amendment does protect the public's interest in being informed about its government. Under traditional first amendment analysis,¹² unreasonable governmental interference with freedom of speech and press is prohibited.¹³ In a negative sense this prohibition advances the public interest in being aware of government actions. At the time the Constitution was ratified, ensuring speech and press freedoms was probably sufficient to permit citizens to obtain essential facts and to communicate with one another about the course of government.¹⁴ One commentator has argued that this situation no longer prevails:

Because of their [government's] scale and complexity, coupled with the interdependence of all aspects of society, government itself is often the chief, if not the only, source of information for the people about the conduct of those who are supposed to be the people's agents. The central problem today is how to deal with government secrecy and—all too often—with government deception.¹⁵

In light of this state of affairs the question arises whether the Constitution provides positive protection for the public's need to know. Does the first amendment, independent of its protection of speech and press freedoms, *guarantee* that the public's interest in knowing shall be protected?

Standing alone, the literal text of the first amendment neither mentions nor seems to imply a right to know.¹⁶ The constitutional history of the amendment appears to be inconclusive as to whether the framers intended the amendment to guarantee vindication of the public interest in being informed.¹⁷ Moreover, at least one commentator has pointed out that the constitutional value of informed speech or press is different from that of free speech and press.¹⁸ Free speech objectives¹⁹ are not necessarily frustrated by excessive

12. See *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47 (1919). See also *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

13. The modern version of Justice Holmes' balancing test is discussed in Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

14. Cox, *Forward: Freedom of Expression and the Burger Court*, 94 HARV. L. REV. 1, 23-24 (1980).

15. *Id.* at 24.

16. Arguably, when access to government information is denied, the press is less "free" to print articles about the subject of such information. Government's refusal to permit access to public places, such as parks and streets, may abridge the rights of speakers. Similarly, government's denial of access to sources of information may abridge the rights of potential listeners—those who would wish to hear the information that would be disclosed. At least where opportunities to gather information existed in the past, government's curtailment of such activities can plausibly be viewed as interference with the activity rather than refusal to facilitate it. See Cox, *Forward: Freedom of Expression and the Burger Court*, 94 HARV. L. REV. 1, 23 (1980).

17. O'Brien, *The First Amendment and the Public's Right to Know*, 7 HASTINGS CONST. L.Q. 579, 589-603 (1980). See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 98-110 (1970).

18. BeVier, *supra* note 7, at 499. Professor BeVier argues that:

[G]overnmental denial of access to information poses a different kind of direct threat to speech than do punishment and censorship, and thus the forms of governmental activity directly implicate different values. Punishment or censorship directly undermine [*sic*] the value of *free* speech, while the denial of access to information undermines the value of *well-informed* speech.

(Emphasis in original.) But to the extent that free speech and informed speech are both necessary to advance the constitutional objective the framers intended free speech to advance, it would not seem to matter that they serve somewhat different values. There are significant areas of overlap between these two kinds of government activity.

19. Professor Emerson has identified four functions of the system of free expression:

government secrecy, since such secrecy does not affect the freedom of individuals to speak their minds or of the press to print. But government secrecy does impair the value of informed speech. To the extent that government refuses to divulge relevant information, speech and press are less informed. How, then, can the first amendment be read to guarantee that speech and press shall be not only free but also informed?

The writings of the late Professor Alexander Meiklejohn indicate that these two values—free speech and informed speech—may coalesce in the achievement of a broader constitutional objective:²⁰ the intelligent exercise of the ballot, or, more broadly, the integrity of the democratic process. If this is true and if vindication of this objective is a primary purpose of the first amendment, direct protection should be given to both of these constitutional values.

Meiklejohn's "structural"²¹ theory is premised on the proposition that the paramount function of the first amendment is fostering and preserving the structure of republican government prescribed by the Constitution. Meiklejohn derived his structural theory from the nature and requirements of self-government and their relationship to the express freedoms guaranteed by the first amendment. For Meiklejohn, democracy implies freedom of speech: "[T]he principle of freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American Agreement that public issues shall be decided by universal suffrage."²² Meiklejohn believed that the protection of speech freedom is itself aimed at the broader social goal of making meaningful the exercise of the franchise. He contended that the amendment protects "forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."²³ Under Meiklejohn's analysis the right to know would receive protection for

(1) assuring individual self-fulfillment; (2) advancing knowledge and discovering truth; (3) providing for citizen participation in the democratic process; and (4) achieving community stability by maintaining a balance between necessary consensus and dissent.

T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970).

20. A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960) [hereinafter cited as *POLITICAL FREEDOM*]; Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245. See also Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 42-51 (1974); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

21. Both Justices Brennan and Stewart use the word "structural" to refer to their first amendment theories. Compare Brennan, *Address*, 32 RUTGERS L. REV. 173 (1979), with Stewart, *Or of the Press*, 26 HASTINGS CONST. L.J. 631 (1975). Justice Brennan's theory borrows heavily from Meiklejohn. Justice Brennan's structural theory is that the first amendment guarantees a public right to be informed because such a right is necessary if the amendment is to fulfill its mission of preserving the integrity of the democratic process. See Part III B *infra*. Justice Stewart's structural theory is that the press clause of the first amendment should be read separately from the speech clause to give special protection to the institutional press. This Comment uses the term "structural" to refer to Justice Brennan's theory and the term "institutional" to refer to that of Justice Stewart.

22. *POLITICAL FREEDOM*, *supra* note 20, at 26.

23. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256.

the same reasons as speech and press freedoms: to preserve the integrity of the election process and thus maintain the conditions essential for the survival of the constitutionally prescribed form of government. Since under modern conditions protection of speech and press freedoms may be insufficient to ensure the kind of meaningful communication about public affairs necessary for self-government, this analysis would guarantee independent protection of a right to know. Meiklejohn believed that in principle the right to vote implies a right to know:

When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. . . . That is why no idea, no opinion, no doubt, no belief, no counterbelief, no *relevant information*, may be kept from them.²⁴

While agreeing with Meiklejohn that nonarticulated constitutional rights can be derived from the structure of the government prescribed by the Constitution, Professor Lillian BeVier contends that the first amendment should not be interpreted to guarantee an informed electorate.²⁵ BeVier's chief objection to judicial protection of a right to know independent of protection of freedoms of speech and press is that the Constitution has placed protection of this right in the hands of the executive and legislative branches of government. If this is true, judicial protection of a right to know would be an unwarranted usurpation of power and might work more to frustrate than to preserve constitutional democracy.

BeVier's conclusion that the value of informed speech and press should not be afforded separate protection is drawn from two sources. First, she rejects Meiklejohn's conception of constitutional self-government. The constitutionally ordained role for the citizen in government, she argues, is "considerably more attenuated"²⁶ than that envisioned by Meiklejohn. The "basic American agreement,"²⁷ she urges, is not that "public issues shall be decided by universal suffrage,"²⁸ but rather that "public issues shall be decided by *representatives of the people* who shall be elected by universal suffrage."²⁹ For BeVier, the primary purpose of the first amendment is to protect "the process of forming and expressing the will of the majority according to which our representatives must govern."³⁰

BeVier's argument here is weak. Her conclusion does not differ appreciably from Meiklejohn's conclusion that the first amendment's primary function is to preserve democracy by ensuring the existence of conditions under which the franchise can be exercised intelligently. But BeVier would not

24. POLITICAL FREEDOM, *supra* note 20, at 75 (emphasis added).

25. BeVier, *supra* note 7, at 485.

26. *Id.* at 505.

27. *Id.*

28. POLITICAL FREEDOM, *supra* note 20, at 27.

29. BeVier, *supra* note 7, at 505.

30. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 309 (1978).

permit the Supreme Court to ensure that the will of the people is actually expressed to the representatives, even though her conclusion as to the first amendment's purpose is consistent with the extension by the Supreme Court of protection to a right to know. The protection of speech and press freedoms may be insufficient to guarantee that the ballot expresses the true will of the majority. Indeed, it is difficult to see how the will of the majority is to be formed when the voters lack important information, or worse, when they are deceived by government officials. BeVier fails to address the question of the efficacy of traditional first amendment protection to ensure that the admitted purpose of the amendment—advancing the integrity of the election process—can be achieved. Meiklejohn's analysis appears to be better suited to resolve this question.

The second reason BeVier rejects independent protection of a first amendment right to know is her concern that neutral principles³¹ could not be formulated to guide or restrain judges faced with the task of deciding particular right to know cases. Meiklejohn's arguments are based upon an analysis of constitutional ends or objectives. He does not generally address the question of what means may be legitimate to implement the ends he derives. BeVier's argument that goal-neutral rules could not be constructed is a means argument. It addresses the question of the legitimacy of the Court's protecting a right to know without discovering or creating neutral principles that transcend the results of particular cases and that can be applied evenhandedly to similar situations. BeVier's objection is not that the Court lacks judicial power or authority to derive unarticulated rights from the form of government ordained by the Constitution.³² It is rather that the only justification for substantive judicial review of majoritarian decisions is the subjugation of such review to the constraints of neutral principles.

The thesis that neutral principles both bind the scope of and justify the substance of judicial review was put forth in 1959 by Professor Wechsler. Wechsler's requirement of neutral principles must be understood as a response to Judge Learned Hand's indictment of judicial supremacy, the uniquely American practice of allowing the judiciary to serve as final arbiter of legal validity.³³ Judge Hand contended that judicial supremacy is unwarranted because when it determines the constitutionality of a law, the Court acts in a legislative manner, weighing the costs and benefits of the legislation in relation to public policy objectives.³⁴ Professor Wechsler contended that judicial supremacy is warranted, but only when judges apply neutral princi-

31. The leading article on the requirement of neutral principles in constitutional adjudication is Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959). On the same subject see also BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

32. BeVier contends that constitutional rules are legitimate if they are derived from the text of the Constitution, from its history, or from the structure of government it prescribes. BeVier, *supra* note 7, at 499-500.

33. L. HAND, *THE BILL OF RIGHTS* (1968).

34. *Id.* at 1-56.

ples in deciding cases. Hence, BeVier's argument in opposition to judicial recognition of a right to know is that such right will not be interpreted neutrally and in accordance with principle.

In response to BeVier, it can be argued either that the right to know can be formulated in terms of neutral principles or that it need not be so formulated. There would appear to be no reason in principle why goal-neutral rules could not be constructed to implement a first amendment right to know. Moreover, the requirement of neutral principles has been effectively criticized.³⁵ There is no reason why the principles according to which a court decides a case should be neutral in the sense of not favoring one side or the other. That the rule of law favors one of the parties is less important than that it be applied even-handedly in similar situations. In *Richmond Newspapers* Justice Brennan argued for judicial restraint and sensitivity in applying the right to attend trials.³⁶ Such restraint and sensitivity could be applied as well in implementing a generalized right to know government information. Thus BeVier's neutral principle objection need not prevent the Court from recognizing an independent right to know

II. THE SUPREME COURT AND THE RIGHT TO KNOW

In many first amendment cases in the past few decades, the Supreme Court has referred to the press' special role under the Constitution of informing the public.³⁷ The Court has also referred to a right of the public to receive a free flow of information about government.³⁸ Since these cases involved content-based interference with the freedom to speak or publish, the question of whether an independent right to know should be protected was not presented to the Court.³⁹ Two recent lines of cases, however, have presented questions directly implicating an independent right to know.

A. The Preferential Treatment Cases

Branzburg v. Hayes,⁴⁰ *Zurcher v. Stanford Daily*,⁴¹ and *Herbert v. Lando*⁴² presented the question whether the press should be given preferred

35. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1084-89 (1977).

36. 448 U.S. 555, 584 (1980) (Brennan, J., concurring).

37. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Estes v. Texas*, 381 U.S. 532, 539 (1965); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

38. *Landmark Communications v. Virginia*, 435 U.S. 829, 838-39 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

39. The commercial speech cases appear to support a right to receive information from willing speakers. To the extent these cases rest upon independent protection of the information flow itself, apart from the freedom of individuals to speak or publish, they are indirect precedent for a right to know government information under government control. See *Central Hudson Gas v. Public Service Comm'n*, 444 U.S. 962 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

40. 408 U.S. 665 (1972).

41. 436 U.S. 547 (1978).

42. 441 U.S. 153 (1979).

treatment under the first amendment to ensure its ability to inform the public, thus vindicating the value of an informed public independently of that of free speech and press.⁴³ The first amendment had been held to protect postpublication activities, such as the dissemination of news.⁴⁴ Here the Court was asked to apply the amendment to prepublication activities, such as the gathering and selecting of printable material.

In *Branzburg*,⁴⁵ having refused to reveal the identity of a confidential source to a grand jury, a reporter claimed a qualified press privilege to protect confidential sources to ensure that the information flow to the public would not be choked off at its source. The Court responded to this claim with skepticism. Though denying the requested privilege, it indicated that prepublication activities are protected: "Nor is it suggested that newsgathering does not qualify for first amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated."⁴⁶

In *Zurcher*,⁴⁷ the press contended that the first amendment prohibits third-party searches of newsrooms and seizures of items found there when a less intrusive means of obtaining the items is available. Without citing any legal or factual authority, the Court rejected the press' contention that confidential sources would dry up if newsrooms could be routinely searched.

In *Herbert*,⁴⁸ the press claimed a first amendment media privilege of immunity from a civil discovery order seeking disclosure of the thoughts and impressions of a reporter at the time when he wrote an allegedly libelous editorial.⁴⁹ While acknowledging the press' role in advancing "the important public interest in a free flow of news and commentary,"⁵⁰ the Court rejected the contention that inquiry into editorial conclusions actually threatens the suppression of truthful information.⁵¹

The Court's rejection in these cases of the press' claims for preferential treatment was based in part upon the Court's conclusions that privileges were not needed to protect the press' function of informing the public and in part upon the weight the Court afforded the countervailing interests involved in the cases. The Court denied that the press clause of the first amendment itself guaranteed special privileges for the press, but it did not deny that prepublication activities of the press were entitled to protection to vindicate the public's interest in being informed about government. The protection of such activities

43. See discussion of these cases in *BeVier*, *supra* note 7, at 494-97.

44. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (right to receive publications); *Lovell v. Griffin*, 303 U.S. 444 (1938) (right to distribute publications).

45. 408 U.S. 665 (1972).

46. *Id.* at 707.

47. 436 U.S. 547 (1978).

48. 441 U.S. 153 (1979).

49. *Id.* at 158-59.

50. *Id.* at 179-80 (Powell, J., concurring).

51. The Court's conclusion in the case was undoubtedly based in large part on the standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which requires that the plaintiff in a libel action prove "actual malice" (knowledge of falsity or reckless disregard for the truth). Plaintiff would have no way of proving knowledge if he could not discover the reporter's thoughts and impressions. 441 U.S. 153, 172 (1979).

may rest upon the press' instrumental role in providing a free flow of information to the public.⁵² If the public has no right to the information flow other than the negative protection afforded it by the protection of speech and press freedoms, then there can be no claim for privileges to secure that information flow. Since the Court in all of these cases addressed the merits of the press' claims, it is clear that the Court was not prepared to reject in principle a first amendment right to know. The results of these cases indicate, however, that if the Court eventually does recognize a generalized right to know, its contours will most probably be very narrowly drawn.

B. *The Access Cases Prior to Richmond Newspapers*

In *Pell v. Procunier*,⁵³ *Saxbe v. Washington Post*,⁵⁴ *Houchins v. KQED*,⁵⁵ and *Gannett v. Depasquala*,⁵⁶ the press, as proxy or surrogate for the public, sought a constitutional right of access to newsworthy information in the government's control. The press did not claim special privileges in these cases, but instead sought access in the name of the general public. Hence, the issue was whether the first amendment guarantees a public right of access to government information. Because access rights implicate only the right to be informed, and not the right to speak or publish, the underlying question in these cases was whether the public has a right to know. At the same time that a majority of the Court failed in these cases to confront the public access or right to know questions, the various opinions offered demonstrate a Court struggling with these issues.

In *Pell*⁵⁷ and in *Saxbe*,⁵⁸ the Court held that on the facts of the respective cases, reporters did not have a first amendment right of access to prisons to interview preselected inmates and report on prison conditions. The press claimed a right of access to fulfill the public right to be informed about prison conditions. By characterizing the press' claim as one for special access rights not available to the general public, Justice Stewart, writing for bare majorities of the Court, avoided the underlying right to know issue.⁵⁹ In *Pell*, the public's right to know was not impaired by the interview ban because the district court found that (1) general access to all parts of the the prison existed, (2) interviews

52. See Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975). Both Justice Stewart's institutional theory of the first amendment and Justice Brennan's structural theory would provide protection for prepublication activities of the press. Justice Stewart would draw the line at access to government information, while Justice Brennan would allow a conditional right of access. See Brennan, *Address*, 32 RUTGERS L. REV. 173 (1979). For conflicting views on the question of whether as a matter of policy the press should have preferred constitutional status, see Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979), and Lewis, *A Preferred Position for Journalism ?*, 7 HOFSTRA L. REV. 595 (1979).

53. 417 U.S. 817 (1974).

54. 417 U.S. 843 (1974).

55. 438 U.S. 1 (1978).

56. 443 U.S. 368 (1979).

57. 417 U.S. 817 (1974).

58. 417 U.S. 843 (1974).

59. 417 U.S. 843 (1974); 417 U.S. 817 (1974).

with randomly selected inmates were permitted, and (3) the press actually enjoyed greater access rights than the general public.⁶⁰ In contrast, the district court in *Saxbe* entered specific findings of fact that the ban on interviews with preselected inmates precluded fair and accurate reporting of prison conditions.⁶¹ Hence, in *Saxbe* the de facto public interest in knowing about the conditions of local prisons was impaired. Justice Powell's dissent, in which Justices Brennan and Marshall joined, argued in favor of independently and affirmatively protecting the value of informed speech:

What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs The . . . First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government. . . . [P]ublic debate must not only be unfettered; it must also be informed.⁶²

In *Houchins*,⁶³ a four Justice plurality⁶⁴ held that reporters had no right to bring television cameras into an area of a county jail, despite a finding that conditions there constituted cruel and unusual punishment⁶⁵ and allegedly had been responsible for the suicide of an inmate. Three Justices in *Houchins* appeared to reject flatly independent protection of a first amendment information right. These Justices asserted that any affirmative guarantee of an informed electorate should be accomplished by the executive or legislative branches of government. Chief Justice Burger's opinion, in which Justices White and Rehnquist joined, stated that the first amendment does not mandate access to public institutions.⁶⁶ The fourth member, Justice Stewart, concurring in the plurality, categorically rejected a right of access component to the first amendment: "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government."⁶⁷

After *Saxbe* was decided, but before *Houchins* came up for argument, Justice Stevens joined the Court, replacing Justice Douglas. Justice Stevens wrote the dissenting opinion for *Houchins*, in which Justices Brennan and Powell joined.⁶⁸ He echoed Justice Powell's dissent in *Saxbe*⁶⁹ supporting a first amendment right to be informed. Justices Marshall and Blackmun did not participate in *Houchins*. How the case would have come out had these

60. 364 F. Supp. 196, 200 (N.D. Cal. 1973).

61. *Saxbe v. The Washington Post*, 417 U.S. 843 (1974), *rev'd*, *Kleindienst v. The Washington Post*, 357 F. Supp. 779 (D.D.C. 1972).

62. 417 U.S. 843, 862 (1974) (quoting Brief for Petitioners 42-48).

63. 438 U.S. 1 (1979).

64. Only seven Justices participated in the case. Chief Justice Burger wrote the principal opinion, in which Justices White and Rehnquist joined. Justice Stewart concurred separately. Justice Stevens, joined by Justices Powell and Brennan, dissented.

65. *Brenneman v. Madigan*, 343 F. Supp. 128, 132-33 (N.D. Cal. 1972).

66. "Neither the First Amendment, nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." 438 U.S. 1, 15 (1979).

67. *Id.* at 16 (Stewart, J., concurring).

68. *Id.* at 23 (Stevens, J., dissenting).

69. 417 U.S. 843, 861 (1974) (Powell, J., dissenting).

Justices participated is anyone's guess. Because he joined Justice Powell's dissent in *Saxbe*, it is reasonably certain that Justice Marshall would have joined with Justices Stevens, Brennan, and Powell. Based on his votes in *Pell* and *Saxbe*, it appears that Justice Blackmun would have joined Chief Justice Burger and Justices White, Rehnquist, and Stewart to form a five to four majority.⁷⁰ The prison-access cases thus cast doubt upon the vitality of a first amendment right to know. But these cases did not entirely reject protection of such a right. The Court simply avoided the question. By characterizing the press' claims as claims for special access, the Court or plurality could reject this claim without actually deciding what access rights, if any, are guaranteed to the public generally.

*Gannett*⁷¹ presented the Court with an opportunity to clarify its position on a first amendment right of access. In *Gannett* two defendants were charged with the murder of a man who was killed while boating. The newspaper petitioner gave extensive coverage to the incident and to police efforts to solve the crime. After their indictment, defendants moved to suppress the statements they had given to police after their arrest and the physical evidence seized as fruits of the allegedly involuntary confessions. At the hearing on these motions defense attorneys moved to exclude the public and the press from the hearing on the grounds that the buildup of adverse publicity threatened defendants' right to a fair trial. Believing that the public and the press have a constitutional right of access to the criminal justice system,⁷² the trial judge nonetheless closed the hearing on the grounds that, on balance, defendants' right to a fair trial in this instance outweighed the public right to witness the performance of the criminal justice system.

On its certiorari review of the closure of the pretrial hearing, the Supreme Court virtually ignored the first amendment claim of the newspaper petitioner. Five Justices in *Gannett* concluded that under the sixth amendment the public may not insist upon access to a pretrial hearing on a motion to suppress evidence. Justice Stewart's majority opinion explicitly declined to address the question of whether there is a first amendment right of access to criminal trials.⁷³ Justice Stewart was willing to assume *arguendo* that the newspaper petitioner had a valid first amendment right of access to the hearing.⁷⁴ He concluded, however, that the trial judge had given "all appropriate deference"⁷⁵ to this claim.

Justice Blackmun's dissent for four Justices also paid little attention to the first amendment claim. The opinion traced the history of open judicial proceedings to its colonial and English roots. Despite the fact that the sixth

70. Justice Blackmun voted with the majority to deny access in both *Pell* and *Saxbe*.

71. 443 U.S. 368 (1979).

72. *Id.* at 376.

73. *Id.* at 392.

74. *Id.*

75. *Id.*

amendment appears to guarantee rights meant for the benefit of the accused,⁷⁶ Justice Blackmun concluded that this amendment could be read to secure as well a public right to insist upon open judicial proceedings.

Justice Powell's concurrence addressed the first amendment question that the majority reserved and concluded that the amendment does guarantee access to judicial proceedings. Weighing the public's first amendment right to open proceedings against the defendants' rights to a fair trial, Justice Powell agreed with the trial judge that under the circumstances presented in *Gannett* the latter rights must prevail.

It is lamentable that the Court made no attempt in *Gannett* to distinguish or explain the prison access cases. Surely some explanation of the Court's reasoning was in order. After all, the claim that the first amendment guarantees public access to observe the penal system is not so very different from the claim that the same amendment guarantees access to the judicial system.⁷⁷ In seizing upon the sixth amendment, the dissenting Justices avoided embroiling the Court in the right to know controversy that had divided it in the prison access cases. The dissenting Justices possibly wanted to locate the right of access to the judicial system in the sixth amendment to avoid the necessity of distinguishing the prison access cases. The circumvention of the first amendment right to know issue and the uncertainty the case left in light of the access cases meant that the Court would have to deal with the issue eventually. As could be expected, it reappeared the next term in the case of *Richmond Newspapers v. Virginia*.⁷⁸

C. The Facts and Holding of *Richmond Newspapers*

Richmond Newspapers presented a factual setting similar to that in *Gannett*. At a defendant's fourth trial⁷⁹ for the murder of a hotel manager, defense counsel moved that the trial be closed to the press and public because of adverse newspaper publicity. The prosecutor did not oppose this motion. The trial judge concluded that the Virginia Code⁸⁰ empowered him to order

76. The sixth amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to a public trial. . . ." U.S. CONST. amend. VI. See 443 U.S. 368, 415-20 (1979) for Justice Blackmun's argument that the literal text of the amendment should not control.

77. In *Richmond Newspapers* the Court distinguished the prison access cases on the ground that trials have traditionally been open to the public, whereas prisons traditionally have not been open. But allowing access only to institutions that enjoy a history of openness may be insufficient to ensure that the public need for information is satisfied, especially since many government institutions have only come into being in the past few decades.

78. 448 U.S. 555 (1980).

79. Defendant's conviction after his first trial was reversed by the Virginia Supreme Court because evidence was improperly admitted against him. *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 136 (1977). The retrial ended in a mistrial when a juror asked to be excused and no alternate was available. A third trial ended in a mistrial, allegedly due to the newspaper accounts of previous trials. 448 U.S. 555, 559 (1980).

80. The trial judge relied upon VA. CODE § 19.2-266, which states:

In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the Court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

The Supreme Court did not treat appellant's claims as drawing this statute itself into question. Rather, the Court treated appellant's attack on the closure as raising claims under the Constitution that would place constitutional limitations on the discretion of trial judges to close criminal trials without consideration of the first amendment rights of the public to witness such trials. 448 U.S. 555 (1980).

closure, and accordingly he ordered the trial closed. Later the same day appellants, Richmond Newspapers and two of its reporters, sought and were granted a hearing on a motion to vacate the closure order. Appellants urged that the first and sixth amendments required the judge to consider whether any less intrusive means of preserving defendant's right to a fair trial were available. Without considering any first amendment rights of appellants or of the public, the trial judge denied the motion to vacate and ordered the trial continued with the closure order in effect.⁸¹ The next day defendant was acquitted, and tapes of the trial were made available to the public.⁸²

Two weeks later appellants were granted leave to intervene in the case *nunc pro tunc*. The Virginia Supreme Court denied plenary review of the closure order, but the United States Supreme Court granted appellant's petition for certiorari. Although the defendant was acquitted, the Supreme Court held that the issue was not moot because the "underlying dispute" was one "capable of repetition, yet evading review."⁸³ The Virginia Supreme Court's refusal to give plenary review could reasonably have led to other trials being closed without consideration of the first amendment rights of the press and public. This was already happening as a result of the *Gannett*⁸⁴ decision.

Richmond Newspapers evoked seven opinions from the Supreme Court. Chief Justice Burger authored a three-Justice "plurality" opinion.⁸⁵ Justice Brennan, joined by Justice Marshall, concurred in the judgment.⁸⁶ Justices Stevens,⁸⁷ Stewart,⁸⁸ and Blackmun⁸⁹ filed separate opinions concurring in the judgment. Justice Rehnquist dissented⁹⁰ and Justice Powell did not participate in the case. Seven Justices concurred in the holding that the first and fourteenth amendments to the federal constitution guarantee a public right to witness criminal trials. In light of the divisions among the Justices and in light of prior right to know cases, exactly what *Richmond Newspapers* stands for is an open question.⁹¹ In the right of access and preferential treatment cases, four Justices had argued strongly for protection of a first amendment right to

81. 448 U.S. 555, 560-61 (1980).

82. *Id.* at 562 n.3.

83. *Id.* at 563 (citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

84. See Brief Amici Curiae on behalf of Reporters Committee for Freedom, The Associated Press Managing Editors, The National Association of Broadcasters, and The Virginia Press Association in *Richmond Newspapers*. As an Appendix to their brief these amici submitted the *Court Watch Study*. The study shows fifty-one attempts to close criminal proceedings in the first seven weeks after *Gannett* was decided. The study also shows that twenty-six of these attempts were successful.

85. 448 U.S. 555, 558-81 (1980) (opinion of Burger, C.J.).

86. *Id.* at 584-98 (Brennan, J., concurring).

87. *Id.* at 582-84 (Stevens, J., concurring).

88. *Id.* at 598-601 (Stewart, J., concurring).

89. *Id.* at 601-04 (Blackmun, J., concurring).

90. *Id.* at 604-06 (Rehnquist, J., dissenting).

91. One commentator has called *Richmond Newspapers* "one of the two or three most important decisions in the whole history of the first amendment." Goodale, *The Three Part Open Door Test in Richmond Newspaper Case*, Nat'l L.J., Sept. 22, 1980, at 26, col.1. See also Goodale, *Gannett is Burned by Richmond's First Amendment 'Sunshine Act'*, Nat'l L.J., Sept. 29, 1980, at 24 (arguing that *Richmond Newspapers* adopts a first amendment right to know).

be informed.⁹² Arguably, the other five had rejected this putative right.⁹³ *Richmond Newspapers* is the first case that stands as precedent, however weak, for a first amendment right to know.

III. THE SCOPE AND DOCTRINAL FOUNDATIONS OF *RICHMOND NEWSPAPERS*

A majority of the Court in *Richmond Newspapers* distinguished *Gannett* on the basis of history. Criminal trials have been open to the public for centuries in the Anglo-American system of justice, while pretrial hearings, themselves a relatively recent phenomenon, have not traditionally been open.⁹⁴ As some Justices noted,⁹⁵ this difference could also distinguish the prison access cases from *Richmond Newspapers*. No doubt the history of openness of criminal trials is the key to the holding in *Richmond Newspapers*. Why history should be controlling is unclear. The public need to be informed about a particular government institution or process is unrelated to the question whether the public has historically been afforded access to that institution or process. What is the relationship between the legal history of criminal trials and the first and fourteenth amendments, upon which the Court predicated its ruling?

None of the Justices appeared to employ legal history to determine the intentions of the framers in penning the first amendment.⁹⁶ If the Justices had wanted to invoke the intentions of the framers, it would seem that the history of the first amendment would have been the relevant inquiry, although the history of open trials might also be relevant to indicate the climate in which the first amendment was adopted. The Justices did not rely upon the history of the first amendment in *Richmond Newspapers*.⁹⁷ Chief Justice Burger employed the history of open trials to characterize the ruling as, and possibly to limit it to, access to places, such as sidewalks and parks, traditionally open to the exercise of first amendment rights. This analysis is consistent with a traditional interpretation of the first amendment, under which government's refusal to permit access to places traditionally open to the exercise of first amendment freedoms is viewed not as a failure to facilitate those freedoms

92. Justice Powell in *Saxbe*, 417 U.S. 843, 861 (1974) (Powell, J., dissenting); Justice Stevens in *Houchins*, 438 U.S. 1, 23 (1978) (Stevens, J., dissenting); Justice Brennan in *Richmond Newspapers*, 448 U.S. 555, 584 (1980) (Brennan, J., concurring). Justice Marshall has not authored an opinion in this area of the law; however, he joined with Justice Powell in *Saxbe* and with Justice Brennan in *Richmond Newspapers*.

93. Chief Justice Burger in *Houchins*, 438 U.S. 1 (1978) (opinion of Burger, C.J.); Justice Rehnquist in *Gannett*, 443 U.S. 368, 403 (1979) (Rehnquist, J., concurring); Justice Stewart in *Houchins*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring); Justice Blackmun in *Gannett*, 443 U.S. 368, 406 (1979) (Blackmun, J., concurring); Justice White has not authored any opinions in this area, but he joined Chief Justice Burger's opinion in *Houchins* and Stewart's opinions in *Pell* and *Saxbe*.

94. 448 U.S. 555, 576 n.11 (1980).

95. *Id.* See also *id.* at 599.

96. Chief Justice Burger may have meant to reason from the framer's intent when he wrote: "The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself. . . ." 448 U.S. 555, 575 (1980). But, the Chief Justice failed to develop this position.

97. 448 U.S. 555 (1980).

but as an indirect interference with their exercise. Thus, under this analysis, the first amendment could be interpreted to secure public access to trials as open public forums without guaranteeing a right to be informed.

In contrast, Justice Brennan used history as a guide to determine the feasibility of allowing access to particular government institutions or processes. Justice Brennan's opinion indicates that he would not limit access to government information solely to those sources of government information that enjoy a tradition of openness.⁹⁸ The meaning of *Richmond Newspapers* may depend upon which use of legal history the other members of the Court find more persuasive.

A. Chief Justice Burger's Three-Justice Plurality Opinion

The Chief Justice's reliance on the first amendment seemed to be an afterthought. In the first part of his opinion Chief Justice Burger traced the jury trial back to its historical antecedents, pointing out that history would be "instructive."⁹⁹ He pointed to the social benefits of open trials, saying that they are therapeutic in aiding a community to achieve a catharsis after a particularly horrible crime has occurred. They fulfill the public's expectation that justice will be satisfied by the appearance of justice. A third benefit is public education about the criminal justice system.¹⁰⁰ The Chief Justice's conclusion in this part of his opinion does not seem to contemplate the first amendment. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."¹⁰¹ When Chief Justice Burger finally discussed the first amendment, his comments indicated that his reliance on that amendment was not to provide independent protection to the public's need to be informed about the judicial system, but instead to vindicate traditional speech and press freedoms. Since these freedoms include the right to hear or listen,¹⁰² the Chief Justice seemed to construe the closure order as an unwarranted interference with traditionally defined first amendment freedoms. The conclusion that he construed the issue in this fashion finds support in his invocation of the "public forum" doctrine, which prior cases had suggested.¹⁰³ The rationale of the public forum doctrine is that first amendment freedoms could be rendered meaningless if government could arbitrarily deny certain speakers—those whose views are unpopular—the use of public facilities, such as parks and sidewalks, to exercise those freedoms.¹⁰⁴ Relying on the history of openness

98. *Id.* at 586–89 (Brennan, J., concurring).

99. *Id.* at 564.

100. *Id.* at 571–73.

101. *Id.* at 573.

102. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

103. *Hague v. CIO*, 307 U.S. 496 (1939). See cases cited in Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1288–98 (1979).

104. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1298 (1979).

of criminal trials and on statements in prior cases that courtrooms are public domains,¹⁰⁵ Chief Justice Burger concluded in effect that denial of access to criminal trials could be construed as government interference with the exercise of first amendment freedoms.

When viewed in this light, Chief Justice Burger's opinion does not seem to address the question whether an information value or a right to know component of the first amendment is entitled to affirmative protection. By invoking the public forum doctrine he could accomplish the objective of informing the public about the operation of the trial stage of the judicial process without giving independent protection to the public interest in being so informed. Chief Justice Burger's first amendment analysis creates confusion in that in some places it goes beyond the public forum doctrine and appears to contemplate independent protection of a limited first amendment right to know. There is, therefore, a tension in the Chief Justice's opinion.

In explaining why the first amendment guarantees a right to witness criminal trials, Chief Justice Burger quoted language from two cases that arguably have little to do with a right to obtain information from a government unwilling to divulge it. From *First National Bank of Boston v. Bellotti*¹⁰⁶ Chief Justice Burger quoted the following language: "[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."¹⁰⁷ *Bellotti* involved a government attempt to limit the stock of public information, not by refusing to divulge information in its control but by prohibiting certain speech of certain individuals. The issue in *Bellotti* was whether government can limit the amount of money a banking corporation can spend to advertise its viewpoint on a referendum issue, such expenditures being considered "speech" for first amendment purposes.¹⁰⁸

From *Kleindienst v. Mandel*,¹⁰⁹ the Chief Justice cited this language: "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'"¹¹⁰ *Mandel* involved the issue of whether a foreign scholar must be admitted to the United States to vindicate the rights of American citizens who wished to hear him speak. The right to receive information referred to by the Court in this case was not a right of access to government information but a right to receive information from speakers willing to divulge it.

Taken out of context and placed in a case in which the issue is the right to obtain government information, these quotes from *Bellotti* and *Mandel* appear

105. *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the Courtroom is public property."); *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring) (The public has a "deep interest" in open trials.).

106. 435 U.S. 765 (1978).

107. *Id.* at 783.

108. *See Buckley v. Valeo*, 424 U.S. 1 (1976).

109. 408 U.S. 753 (1972).

110. *Id.* at 762.

to support independent protection of a right to be informed. When government refuses to allow access to trials (or to other sources of government information), the "stock of information from which members of the public may draw"¹¹¹ is diminished and the "right to receive information and ideas" is abridged. However, the issue in *Bellotti* and *Mandel* was not access to government information, but government interference with the process of communication between willing speaker and listeners.

Chief Justice Burger's use of the *Bellotti* and *Mandel* quotations in *Richmond Newspapers*, without an attempt to explain or distinguish the former cases, causes confusion. Justice Stevens seems to have interpreted the Chief Justice's opinion as providing independent protection for a right to be informed. Justice Stevens joined the opinion of the Chief Justice, but concurred separately to point out what he believed the case to hold. According to Justice Stevens, *Richmond Newspapers* squarely holds that the "acquisition of newsworthy matter" is entitled to "constitutional protection."¹¹² Only if Justice Stevens' interpretation of Chief Justice Burger's opinion is correct can the decision be read to find strong support for an affirmative protection of the right to be informed.

B. Justice Brennan's Concurrence

Justice Brennan would base the holding in *Richmond Newspapers* upon the right of the public to be informed about the judicial process. Adopting Meiklejohn's approach,¹¹³ Justice Brennan derives a first amendment right to know from the structure of the republican government ordained by the Constitution.¹¹⁴

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," . . . but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.¹¹⁵

Justice Brennan's reply to commentators such as Professor BeVier,¹¹⁶ who contend that goal-neutral rules designed to vindicate a right to know cannot be constructed, is simply that judges must exercise judicial sensitivity

111. 435 U.S. 765, 783 (1978).

112. 448 U.S. 555, 582 (1980).

113. See Brennan, *Address*, 32 RUTGERS L. REV. 173 (1979); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

114. 448 U.S. 555, 587-88 (1980).

115. *Id.* (citations and footnotes omitted).

116. See notes 7, 18, 30-32 *supra*.

and restraint in right to know cases. Because the stretch of protection in right to know cases is endless, judges must have some guidance. It is for this reason that Justice Brennan turns to legal history. A tradition of openness, he asserts, implies a favorable judgment of experience. Moreover, the "Constitution carries the gloss of history."¹¹⁷ While tradition is a useful guide, however, it is not to be determinative. Besides tradition, Justice Brennan sets forth a second "guiding principle"¹¹⁸ to help judges in right to know or right of access cases. Under this "structural significance"¹¹⁹ principle, access to government institutions and processes would be limited to those institutions and processes whose social goals are furthered by permitting public access. A government process whose objectives are advanced by public access is said to have "structural significance." Although the Justice does not say so explicitly, it is clear from his whole opinion that under appropriate circumstances government institutions that have not traditionally been open may possess structural significance.

Open trials serve many of the goals of the criminal justice system. Public access to trials serves as a check on possible abuse of judicial power and thereby helps to ensure that defendants receive fair trials. Open trials also advance other objectives the judicial system is designed to serve, such as fulfilling the public's expectation that justice will be satisfied by the appearance of justice and the therapeutic and educational goals mentioned by Chief Justice Burger.¹²⁰ To this extent trials possess structural significance. Many of these same considerations apply equally well to prisons. Although prisons do not enjoy a tradition of openness, permitting reasonable access to them will serve as a check on official abuse of power. Of course, the countervailing government interest in prison security may, on balance, outweigh the public need for the information, as the public need is reflected by the structural significance standard. All of the Justices appear to agree that if there is a right to be informed, this right is not absolute. Both Chief Justice Burger and Justice Brennan contemplated the use of a balancing test to determine particular public access claims.¹²¹

Before *Richmond Newspapers*, the Court appeared to be split five Justices to four in opposition to affirmative protection of an information value of the first amendment. *Richmond Newspapers* casts some doubt on the continuing vitality of this division. If Chief Justice Burger's opinion reads as suggested by Justice Stevens, then perhaps reevaluation of the opposition to a right to know is occurring.

117. 448 U.S. 555, 589 (1980).

118. *Id.*

119. *Id.* at 598.

120. *Id.* at 570-73.

121. Chief Justice Burger stated that absent an "overriding interest articulated in the findings," trials must be open. *Id.* at 581. Justice Brennan clearly balanced the societal value of open trials against the state's countervailing interests in closing them. *Id.* at 598 n.23.

C. Individual Opinions of Justices Stewart and Blackmun

Justice Stewart's opinions in the right of access and preferential treatment cases have been confusing and seemingly contradictory. On the one hand, he would read the press clause of the first amendment to give special privileges to the press in order to enable it to advance the "broad societal interest in a full and free flow of information to the public."¹²² According to Justice Stewart, the press has a "constitutionally designated function of informing the public."¹²³ On the other hand, he flatly denies that the press has any special rights of access to government information.¹²⁴ Professor BeVier has pointed out this contradiction:

[I]f the first amendment ought to be read as vindicating a broad societal interest in a full and free flow of information to the public, and if the press has the constitutionally designated function of informing the public, then it is hardly troublesome to find the press asserting a right of special access to vindicate society's interest and perform its own function.¹²⁵

Justice Stewart's opinion in *Richmond Newspapers* provides some evidence that he may be rethinking his position. In *Houchins*¹²⁶ he categorically denied that the first amendment has an access component: "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government. . . . The Constitution does no more than assure the public and the press equal access once government has opened its doors."¹²⁷ In *Richmond Newspapers* Justice Stewart stated that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."¹²⁸ In the footnote to this statement Justice Stewart cited *Mandel*¹²⁹ and *Branzburg*¹³⁰ for the propositions, respectively, that the first amendment guarantees a right to listen and a right to gather information.¹³¹ At least with respect to government processes that traditionally have been open, Justice Stewart appears to have accepted protection of some rights of access.¹³² Of course, he may have adopted the public forum doctrine as a means of providing public access to trials while not providing affirmative protection of the right to be informed. If

122. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

123. *Zurcher v. Stanford Daily*, 436 U.S. 547, 572 (1978) (Stewart, J., dissenting).

124. In an address Justice Stewart stated:

There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

Stewart, *Or of the Press*, *supra* note 21, at 636 (footnote omitted).

125. BeVier, *supra* note 7, at 490.

126. 438 U.S. 1 (1978).

127. *Id.* at 16.

128. 448 U.S. 555, 559 (1980).

129. 408 U.S. 753 (1972).

130. 408 U.S. 665 (1972).

131. 448 U.S. 555, 599 n.2 (1980).

132. *Id.* at 598-600.

this is the case, however, it is difficult to see why Justice Stewart did not join in Chief Justice Burger's opinion.

Justice Blackmun's individual opinion in *Richmond Newspapers* is a case study of an embattled Justice—or one who thinks himself so—fighting for his own approach to an issue. Despite his concurrence in the judgment, Justice Blackmun continues to believe that “the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.”¹³³ He adopts the Court's first amendment approach only to reach the result that the public need to know about the administration of justice is provided some protection: “I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial.”¹³⁴

Of the two, Justice Stewart appears to be more likely than Justice Blackmun to join with the four Justices advocating a right to know to form a new majority. If such a majority were formed, Justice Brennan's structural significance test would probably be embraced. The adoption of this test would eventually force the Court to readdress the question of whether the right of access to the judicial system includes a right of access to pretrial hearings or even to penal institutions. If this happened the Court would probably embrace a generalized right to know, with certain government information, such as military secrets¹³⁵ or other confidential information, being exempted from access claims. The Court could protect a generalized right to know based upon the first and fourteenth amendments as a means of ensuring the integrity of the democratic process; but whether the Court will protect the right to be informed is still an open question.

IV. CONCLUSION

In his brief for appellants, *Richmond Newspapers* and its two reporters, Professor Lawrence Tribe stated that “[s]elf-government presupposes knowledge; and knowledge of the administration of justice lies at the core of any society dedicated to the rule of law.”¹³⁶ No doubt knowledge of the judicial system is vital to intelligent self-government, but is knowledge of the operations of the executive and legislative branches, with their vast and intricate network of agencies, subordinate agencies, departments, and councils, any less vital? Perhaps, in a sense, with the passage of freedom of information acts and sunshine legislation on both the state and federal levels,¹³⁷ we do not need a constitutional right to know at present. But the political climate could change. The Bill of Rights was intended to secure above and beyond the majoritarian process certain fundamental rights without which self-govern-

133. *Id.* at 603.

134. *Id.* at 604.

135. See *Near v. Minnesota*, 283 U.S. 697 (1931).

136. Brief for Appellant, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

137. See notes 1-2 *supra*.

ment would be impossible. The need for protection of fundamental constitutional rights is ever present, no matter what the political climate.

Since there are alternative bases for the holding, and since the Court was badly divided, *Richmond Newspapers* is rather weak precedent for a generalized first amendment right to know. At most, the case seems to stand for the proposition that there is a constitutional right of access to those government facilities and processes that can boast of a long tradition of openness. At a minimum, the case possibly stands for nothing more than a revival of the public forum doctrine.¹³⁸ The tension in *Richmond Newspapers* between the scope of protection and the alternative doctrinal foundations will probably bring another right to know case before the Supreme Court. When this happens, it is to be hoped that the entire Court will squarely address the right to know question and its implications under the Constitution.

David N. Brockett

138. See Project, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 155 (1980).

